

**PHILADELPHIA, BALTIMORE AND WASHINGTON
RAILROAD COMPANY,
PETITIONER,**

VS.

ALFRED H. SMITH.

In the Supreme Court of the United States.

No. 1081—October Term, 1917.

**Petition for Writ of Certiorari to the Court of
Appeals of Maryland.**

RESPONDENT'S BRIEF.

The petition for the writ of Certiorari in this case and the brief in support of it appear to be based on the proposition that a man cooking cannot be engaged in interstate commerce within the meaning of the Federal Employer's Liability Act.

FACTS BEARING ON THE ABOVE PROPOSITION.

The petitioner is a common carrier with a main line from Philadelphia, Pennsylvania, to Cape Charles, Virginia, running through the States of Pennsylvania, Delaware, Maryland and Virginia. It has a branch line known as the Oxford Branch, running from Clayton, Delaware, to Oxford, Maryland, a distance of fifty-four miles. Fifteen miles of the road is in Delaware, and the remainder, some thirty-nine miles, in Maryland. Easton is a station in Maryland on the Oxford Branch. The respondent was employed by the petitioner as a carpenter laborer and was engaged with a gang of bridge carpenters who worked all over the lines in the different States wherever bridges or bridge abutments needed repair, over which ran the petitioner's trains.

Record, page 69—

"Q. What was his employment during the length of time? A. He was a carpenter laborer but ('before' in the record by mistake) he done the cooking.

Q. He did cook? A. Yes, sir.

Mr. Goldsborough:

Q. He was employed as a carpenter laborer? A. Yes, sir. That's the way we have them on our roll.

Mr. Lewis:

Q. So there may be no misunderstanding, what is a carpenter laborer? A. He's a man that does labor work; works with the carpenters. The rate of his pay causes him to be rated as a laborer; a low rate of pay.

Q. Do you mean he worked as a carpenter? A. No, sir; he worked with them.

Q. But not as a carpenter? A. No, sir."

Record page 71:

"Cross Examination by Mr. Goldsborough.

Q. Mr. Larrimore, in speaking of bridge laborers, as I understand your testimony he was a bridge laborer or an assistant to bridge carpenters? A. No, he's a man unskilled in carpentering. The reason he is called a laborer is on account of the rate of pay he receives. We place them on the roll as carpenter laborers. That means they work with the carpenters.

Q. That means he worked with the carpenters? A. Yes, in that respect; he never was engaged in the work.

Q. He never was a carpenter? A. No, sir.

Q. The carpenters he was engaged to work with were bridge carpenters? A. We're called bridge carpenters, but our gang done principally bridge work.

Q. As I understand you it was principally bridge work your gang did? A. Yes, sir.

Q. Those were bridges over which trains run between the states of Maryland and Delaware? A. Yes, sir."

A car in which the gang ate, slept, and lived went back and forth between the States with the bridge gang. On the twenty-third of December, 1915, the car, generally called a camp car, was on a siding below Easton, the gang being engaged in repairing bridge abutments on a bridge below Easton over which ran the interstate passenger and freight trains of the petitioner. As indicated above, these trains were all either trains which were going from the State of Maryland into the State of

Delaware or had come from the State of Delaware into the State of Maryland. The duties of the respondent and those in which he had been engaged along with the bridge gang for nearly twenty-seven years (Record page 78.)

("Q. At the time of your injury at Easton how long had you been in the service of the company? A. Twenty-six years, six months and three days.

Q. You were sixty-seven—sixty-eight at the time of the injury? A.—I was in my 68th.

Q. You would be pensioned at seventy wouldn't you? A. Yes, sir.")

were principally to take care of the camp car, to keep it clean, attend to the beds, and prepare and cook the meals for the gang, including himself. The men, including the respondent, and the boss of the gang, who was also the respondent's boss, bought their food together, the camp car, as above indicated being the place indicated by the petitioner in which the respondent should perform his duties. On the above date a freight train on its run from Oxford to Clayton carrying interstate freight, stopped at Easton to pick up a freight car being loaded at the Easton Commission Company's warehouse. The engineer, with the engine tender, went into the warehouse siding, pulled out the car, pulled the car in on the main track and then made what is called a flying switch, that is, gave the car ahead of the engine impetus so that it would go back and couple with the balance of the freight train while the engine itself cut loose and went back on the siding on which was located the camp car. The engineer knew the camp car was on the siding and its location, which was one hundred and fifty-four feet back from what is known as the "clear" of the switch. The record discloses that the engineer negligently ran the engine with great violence against the car to which the camp car was coupled, partly demolishing one end of it. The collision caused the cars, of which the camp car was one, to move south, when they ran into other cars. The plaintiff describes the accident as follows (Record page 17):

"Q. Now Mr. Smith, what were you doing on the

23rd day of December, 1913? A. I was getting dinner. I was cooking a big turkey, and a freight came along between eight and nine o'clock. They always gave me warning before when they were coming in on that track. I had been to the stove to baste the turkey. I had two kettles of boiling water for the potatoes. I just started after them when they struck me. I was knocked about ten feet and bruised my chin.

The witness continuing further states: When they struck the other two cars before I could recover they knocked me over a chair and my shoulder struck here (indicating). I had no use of my shoulder since. If I have to 'bust' any wood I have to put the axe here (indicating) I can't cut wood. My whole dependence is on the R. R. Co., with a sister and niece."

ARGUMENT.

A dining car, on an interstate run, is engaged in interstate commerce:

Johnson vs. Southern ~~Pacific~~ Co. 196 U. S. 1, 21; 49 L. Ed. 361, 371.

If a dining car, attached to an interstate train, is engaged in interstate commerce, then clearly a waiter or cook on a dining car being the employees, the performance of whose duties make it possible for the dining car to perform the only function which it is to perform, is engaged in interstate commerce.

Can a man cooking a meal in the kitchen of a dining car for the comfort of an interstate passenger on an interstate train be said to be engaged in interstate commerce with any more force than a man cooking a meal for a workman repairing a bridge over which runs trains engaged in interstate commerce, and whose contract with the railroad requires him to cook that meal in one of its cars located on the line of the railroad at the nearest point possible to the place where the bridge worker is engaged, so as to facilitate the work.

On page 13 of the brief filed with the petition for a writ of certiorari the petitioner says, referring to the re-

spondent's work, "and had no closer relation to interstate commerce than a dishwasher, or a laundryman who was solely employed at a railway station eating house where meals are served or sheeted beds are furnished for the use of employees and travellers over the railroad, would have."

Everyone must eat, **everyone** must have laundry done, dishes in general must be washed, and a dishwasher, laundryman or **cook** in a railway eating house, permanently located and disconnected with any **special work going on**, has no possible analogy to the case of a cook whose contractual duty requires him to cook on a camp car located on the tracks of the railroad, and as close as possible (in order to facilitate the work) to a special gang engaged in interstate commerce, of which gang he is one. If, instead of the instant case of one man of a gang of bridge workers being, for reasons of economic expediency, singled out to cook, each bridge worker was under contract to cook his meals, while on duty, on a car of his employer located on its tracks at a point as near as possible to the bridge work, in order to facilitate the quick return of the worker to the bridge being repaired, would the petitioner for one moment contend that the bridge worker, injured while cooking his meal, by the negligence of a fellow servant engaged in interstate commerce, was not entitled to the protection of the act in question.

In *Mondou vs. N. Y. N. H & Harford R. Co.*, 223 U. S. 6, 48, this Court said:

"As is well said in the brief prepared by the late Solicitor General: 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act,

commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

Respectfully submitted,

T. ALAN GOLDSBOROUGH,

Attorney for Respondent.